in the

Supreme Court

of the

United States

October Term, 1979

No. 79-130

JOHN E. BEHNKE,

Appellant,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

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July 18, 1979

INDEX

CITATIONS

Cases **Page**

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JURISDICTIONAL STATEMENT

JOHN E. BEHNKE, the appellant, appeals from the final judgment of the Supreme Court of Iowa dated March 21, 1979, rejecting his contention that he could not be suspended from the practice of law for violation of an ethical consideration of The Iowa Code of Professional Responsibility For Lawyers consistent with the due process clause of the 14th Amendment to the Constitution of the United States, because the Code, as interpreted by the Supreme Court of Iowa at the time of the offense, not only failed to provide fair warning that ethical considerations were penal in character but, on the contrary, indicated that ethical considerations, as distinguished from disciplinary rules, were merely aspirational in character.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, which appears in the appendix hereto, p. 1a-19a, *infra,* is reported at 276 N.W.2d 838 (Iowa 1979).

JURISDICTION

The judgment of the Supreme Court of Iowa, suspending appellant from the practice of law in Iowa, was entered on March 21, 1979. A motion for rehearing was entertained and denied on April 19, 1979. See p. 20a, *infra.*

A notice of appeal to this Court was duly filed in the Supreme Court of Iowa on July 11, 1979. See p. 21a, *infra.*

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

QUESTION PRESENTED

Whether an Iowa lawyer may be suspended from the practice of law in Iowa for violation of an ethical consideration of the Iowa Code of Professional Responsibility For Lawyers consistent with the due process clause of the 14th Amendment to the Constitution of the United States when the Code, as interpreted by the Supreme Court of Iowa at the time of the offense, not only failed to provide fair warning that ethical considerations were penal in character but, on the contrary, indicated that ethical considerations, as distinguished from disciplinary rules, were merely aspirational in character.

PERTINENT CONSTITUTIONAL PROVISIONS AND IOWA CODE OF PROFESSIONAL RESPONSIBILITY PROVISIONS

Fourteenth Amendment, United States Constitution, Section 1:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

Code of Professional Responsibility For Lawyers of the State of Iowa, Preamble and Preliminary Statement:

> "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures of penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances."

RAISING THE FEDERAL QUESTION

As reported on page 3 of its opinion, the Supreme Court of Iowa says, "The Commission found respondent violated only EC 5-5 (drafting instruments granting him beneficial interest) as charged in Counts I and II." See p. 3a, *infra*.

"Respondent contends violation of an ethical consideration does not provide a basis for disciplinary action." See p. 3a, *infra*.

On page 4 of the opinion, the Supreme Court of Iowa goes on to hold "violation of an ethical consideration, standing alone, will support disciplinary action." See p. 4a, *infra*.

On page 9 of the opinion, the Supreme Court of Iowa acknowledges "Respondent also asserts old EC 5-5 was so vague it violated his due process rights under the fourteenth amendment to the United States Constitution . . . . Again, we cannot agree . . . ." See p. 9a, *infra*.

STATEMENT OF THE CASE

The appellant, JOHN E. BEHNKE, has practiced law in Parkersburg, Iowa, since 1962. At that time, he took over the practice of his father (also John E. Behnke), who had practiced law in Parkersburg for forty years before appellant assumed the practice.

The Supreme Court of Iowa, in essence, suspended appellant for three years for drafting various wills for

one Eilert Wumkes, and his sister Nellie Wumkes, from September 9, 1963 through June 11, 1975, which named appellant as contingent beneficiary in violation of the following ethical considerations of The Iowa Code of Professional Responsibility For Lawyers as it was then worded:

> **EC 5-5** A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.
>
> **EC 5-6** A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

During the entire period of the offenses, The Code of Professional Responsibility For Iowa Lawyers provided that "The Ethical Considerations are aspirational in character . . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in

character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Far from being warned by this language that he could be disciplined for violation of an ethical consideration, an Iowa lawyer could clearly assume during the period of the offenses that he would no more be disciplined for violation of an ethical consideration alone than for violation of a commandment in the Bible alone.

The Supreme Court of Iowa, however, implies in its opinion, that an Iowa lawyer in the years of appellant's offenses should have been warned by *In re Frerichs,* 238 N.W.2d 764, 769 (Iowa 1976) that violation of an ethical consideration alone would result in disciplinary proceedings.

Not only did *In re Frerichs, supra,* come into being after the period of appellant's offenses, but the language quoted by the Supreme Court of Iowa as putative fair warning that violation of an ethical consideration would result in discipline does not appear to say that at all. The language offered by the Supreme Court of Iowa reads:

> All lawyers practicing before this court are bound by the *canons* . . . They are not free to view them merely as aspirational. A *canon* cannot be ignored by an attorney on the claim he believes it conflicts with his view of a constitutionally protected right. The purpose of the *canons* as explained by the ethical considerations, disciplinary rules and adjudicated decisions is to show him the professionally acceptable route through questions or doubts he

may have regarding such conflicts. (Emphasis ours.)

This language deals with The Canons of Ethics. The Canons of Ethics, according to the Preliminary Statement of The Iowa Code of Professional Responsibility For Lawyers, are not the same as the Ethical Considerations of that code. "The Canons are statements of axiomatic norms . . . They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived."

For some reason not specified, during the time appellant's case was being prosecuted, EC 5-5 on December 16, 1977, was amended to transfer the part pertinent to this case to new disciplinary rule 5-101(B).

THE QUESTION IS SUBSTANTIAL

The question presented by this case reaches far beyond Iowa; it reaches every state that has adopted The American Bar Association's Code of Professional Responsibility For Lawyers.[1]

This Court has held that an attorney's disciplinary proceeding is quasi-criminal in nature and that the attorney charged is entitled to due process of law. *In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2d 117 (1968).

This Iowa lawyer has been disciplined for conduct which clearly was not a disciplinary offense when committed. Indeed, the Iowa Bar — with the approval of the Iowa Supreme Court — in the process of getting Behnke holds that conduct described in the Code as merely aspirational may, whenever it is felt necessary to get at a particularly offensive character, be deemed a disciplinary offense.

[1]The Iowa Code of Professional Responsibility For Lawyers is the ABA Code almost verbatim.

This is the stuff of witch hunts. The due process clause surely entitles lawyers to fair warning of what conduct will result in discipline, to freedom from discipline inflicted by authority of *ex post facto* judicial glosses on bible-like ethical pronouncements, and to regulation by a rule of law and not men.

This Court said in *Bouie v. Columbia,* 378 US 347, 12 L.Ed. 2d 894, 84 S.Ct. 1967, at 12 L.Ed.2d 899:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States,* 314 US 306, 311, 86 L.Ed 226, 231, 62 S.Ct 237, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute' for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is

regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss . . . .' *Freund,* The Supreme Court and Civil Liberties, 4 Vand L Rev 533, 541 (1951). See Amsterdam, Note, 109 U Pa L Rev 67, 73-74, n 34.

"If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, Section 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action' or 'that *aggravates* a *crime,* or makes it *greater* than it was, when committed.' *Calder v. Bull,* 3 Dall. 386, 390, 1 L.Ed 648, 650.[4] If a state legislature is barred by the Ex

[4]"Thus, it has been said that 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.' *Kring v. Missouri,* 107 US 221, 235 27 L.Ed 506, 511, 2 S.Ct 443. See, *Fletcher v. Peck,* 6 Cranch 87, 138, 3 L.Ed 162, 178; *Cummings v. Missouri* 4 Wall 277, 325-326, 18 L.Ed 356, 363, 364."

Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Cf. Smith v. Cahoon,* 283 U.S. 553, 565, 75 L.Ed 1264, 1273, 51 S.Ct 582. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d.Ed 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61."

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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By:/s/ Hugo L. Black, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to ROGER J. KUHLE, ESQ., 600 Hubbell Building, Des Moines, Iowa 50309, and JOHN WERNER, ESQ., Office of Attorney General, State Capitol Building, Des Moines, Iowa 50310, this 17th day of July, 1979.

/s/ Hugo L. Black, Jr.
Hugo L. Black, Jr.

in the

Supreme Court

of the

United States

October Term, 1979

NO.

JOHN E. BEHNKE,

Appellant,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

On Appeal from the Supreme Court of Iowa

APPENDIX

Filed March 21, 1979

IN THE SUPREME COURT OF IOWA

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61443

THE COMMITTEE ON
PROFESSIONAL ETHICS AND CONDUCT
OF THE
IOWA STATE BAR ASSOCIATION
Appellee,

vs.

JOHN E. BEHNKE,
Appellant.

Appeal from the report of the Grievance Commission.

Attorney drafted wills which named him as a contingent beneficiary. LICENSE SUSPENDED.

George Lindeman of Lindeman & Yagla, Waterloo, for appellant.

Hedo M. Zacherle, Lee H. Gaudineer, Jr., and Roger J. Kuhle, Des Moines, for appellee.

Considered en banc.

REYNOLDSON, C.J.

February 22, 1977, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (complainant) filed an eight-count complaint against Parkersburg attorney John E. Behnke (respondent) with this court's Grievance Commission (Commission). Counts I and II charged respondent with drafting certain wills naming himself as contingent beneficiary and executor in violation of specified provisions of the Iowa Code of Professional Responsibility for Lawyers.

The third division of the Commission received evidence and testimony in the summer of 1977. The Commission found complainant's allegations in counts I and II were "sustained by convincing preponderance of the evidence," concluded respondent violated Ethical Consideration 5-5 of the Iowa Code of Professional Responsibility for Lawyers, and recommended a three-year suspension "if not complete disbarment." One division member separately recommended disbarment.

Respondent appealed and raises several issues which are treated in the divisions which follow. We hold respondent's license to practice law shall be suspended and shall not be reinstated for at least three years.

I. *Can the violation of an ethical consideration provide a basis for discipline?*

Complainant charged that in drafting wills for Eilert and Nellie Wumkes respondent violated the following ethical considerations of the Iowa Code of Professional Responsibility for Lawyers as it was worded prior to December 16, 1977:

> *EC 5-5* A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. *Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.*
>
> *EC 5-6* A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

(Emphasis added.) On December 16, 1977, EC 5-5 was amended to transfer the substance of the emphasized sentence to new disciplinary rule 5-101 (B):

> A lawyer or the lawyer's partners or associates shall not prepare an instrument in which a client desires to name the lawyer beneficially unless the lawyer is the spouse of, or is the son in law or daughter in law of, or is otherwise related by consanguinity or affinity, within the third degree, to the client.

The Commission found respondent violated only EC 5-5 (drafting instruments granting him beneficial interest) as charged in counts I and II.

Respondent contends violation of an ethical consideration does not provide a basis for disciplinary action. We recently resolved this issue:

> All lawyers practicing before this court are bound by the canons . . . They are not free to view them merely as aspirational. A canon cannot be ignored by an attorney on the claim he believes it conflicts with his view of a constitutionally protected right. The purpose of the canons as explained by the ethical considerations, disciplinary rules and adjudicated decisions is to show him the professionally acceptable route through questions or doubts he may have regarding such conflicts.

In re Frerichs, 238 N.W.2d 764, 769 (Iowa 1976). Attorneys have been disciplined for ethical consideration violations in *Frerichs* and at least five other cases. *Committee on Professional Ethics & Conduct v. Wilson,* 270 N.W.2d 613 (Iowa 1978); *Committee on Professional Ethics & Conduct v. Baker,* 269 N.W.2d 463 (Iowa 1978); *Committee on Professonal Ethics & Conduct v. Sloan,* 262 N.W.2d 262 (Iowa 1978); *Committee on Professional Ethics & Conduct v. Toomey,* 253 N.W.2d 573 (Iowa 1977); *Committee on Professional Ethics & Conduct v. Bromwell,* 221 N.W.2d 777 (Iowa 1974).

Although in these decisions lawyers were not disciplined for ethical consideration violations alone, we find nothing to support respondent's assertion we should

draw such a distinction. Nor are we willing to accept respondent's suggestion we re-examine *Frerichs.* We hold violation of an ethical consideration, standing alone, will support disciplinary action.

II. *Can repondent raise legal issues not presented to the Commission?*

Respondent has raised issues which apparently were not presented to the Commission, including the issue just resolved. Complainant has made no objection. Nonetheless, the question arises whether we now should consider them.

In *Commission on Professional Ethics & Conduct v. Roberts,* 246 N.W.2d 259 (Iowa 1976), we declined to reach a contention that Roberts was not provided with timely notice of his hearing before the Commission "because it was not urged before the Commission." *Id.* at 260. That complaint related to procedural due process. Had Roberts complained to the Commission the alleged defect could have been corrected.

Most of respondent's complaints in this appeal are different. He alleges he should prevail because Commission's report was not timely filed with this court, a defect which, after the event, is beyond correction. He contends EC 5-5 is unconstitutionally vague. Constitutional issues lie exclusively within the judiciary's domain. *Salsbury Laboratories v. DEQ,* N.W.2d , (Iowa 1979).

Commission rule 13 provides the Commission shall hold a hearing and issue a ruling "upon any preliminary motion or application filed in connection with a

complaint." *Supreme Court Order of June 23,1975, reprinted in Iowa Court Rules,* Sup. Ct. R., at 25d (1979). Our rule 118.9 requires the Commission's report to include "conclusions of law" as well as findings of fact and recommendations.

While these provisions indicate questions of law ordinarily should be preserved by raising them before the Commission, we are not persuaded traditional concepts of error preservation must always be imposed in attorney disciplinary proceedings. To do so would be to characterize the procedure as just an unusual lawsuit. It is not:

> "A disciplinary proceeding is bascially an inquiry into the fitness of a member of the bar, in the light of his [or her] conduct, to continue in the practice of law." This proceeding is not criminal, but is special, civil in nature, and has been described as like an investigation by the court into the conduct of its officers.
>
> The matter is triable de novo in this court . . .

Committee on Professional Ethics & Conduct v. Kraschel, 260 Iowa 187, 193-94, 148 N.W.2d 621, 625 (1967) (citations omitted). *See Mildner v. Gulotta,* 405 F. Supp. 182, 191-92 (E.D.N.Y. 1975) *aff'd mem.,* 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976); *In re; Echeles,* 430 F.2d 347, 349-50 (7th Cir. 1970).

A distinction must be drawn between basic concepts of ethics policy and relatively routine issues of procedure or evidence. Where it is apparent that raising the legal issue before the Commission would not have

changed the record made there, nor the course of the proceeding before that body, we will not automatically apply the error preservation principles closely linked to the adversary nature of a lawsuit. We have the ultimate responsibility to determine respondent's fitness to practice law. We would not always discharge that responsibility if we invariably rejected either party's law issues on error preservation grounds.

III. *Are Iowa Sup. Ct. R. 118 filing and appeal periods mandatory and jurisdictional?*

Rule 118.9 provides that "[t]he disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument."

In this case all briefs were to be filed October 15, 1977. Respondent's brief was filed November 1. The Commission's report was dated November 28. Respondent's first appeal was filed January 6, 1978. The report was not filed with this court until February 21, 1978.

Complainant concedes the Commission was very late in filing its report with this court. It offers no excuse or explanation. The Commission did not notify this court and the parties of its inability to file the report on time, a requirement of rule 118.9. Although the report was dated within thirty days from the date respondent's brief was actually filed, through some omission it was not filed with this court for almost three months.

Although rule 118.9 employs the word "shall," we are satisfied the mandatory-directory distinction explained in *Taylor v. Department of Transportation,* 260

N.W.2d 521, 522-24 (Iowa 1977), is applicable. The thirty-day filing requirement "is not essential to accomplishing the principal purpose of [our ethics rule] but is designed to assure order and promptness in the proceeding." *Id.* at 523. *Accord, Caldwell v. State Bar,* 13 Cal. 3d 488, 496, 531 P.2d 785, 791, 119 Cal. Rptr. 217, 223 (1975); *Maryland State Bar Association, Inc. v. Frank,* 272 Md. 528, 532-34, 325 A.2d 718, 720-21 (1974).

Violation of a directory obligation ordinarily does not invalidate subsequent proceedings unless prejudice is shown. *Taylor,* 260 N.W.2d at 523. Respondent does not attempt to show prejudice. He claims such showing is unnecessary because an attorney disciplinary proceeding is quasi-criminal in nature, citing *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed. 2d 117 (1968). In *Ruffalo* five members of the court said such proceedings "are adversary proceedings of a quasi-criminal nature." *Id.* at 551, 88 S.Ct. at 1226, 20 L.Ed. 2d at 122. The language was used in the context of a procedural due process issue.

Although some courts have used the *Ruffalo* language without comment, *see Carlton v. FTC,* 543 F.2d 903, 906 & nn.21 & 22 (D.C. Cir. 1976), other courts have declined to pigeonhole disciplinary proceedings. *See In re Daley,* 549 F.2d 469, 474-77 & n.6 (7th Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed. 2d 89 (1977); *In re Abrams,* 521 F.2d 1094, 1099-100 (3d Cir. 1975), *cert. denied,* 423 U.S. 1038, 96 S.Ct. 574, 46 L. Ed. 2d 413 (1975); *Polk v. State Bar,* 480 F.2d 998, 1001-02 (5th Cir. 1973); *Echeles,* 430 F.2d at 349-50; *Mildner v. Gulotta* 405 F. Supp. at 191; *In re Bogart,* 386 F. Supp. 126, 131 (S.D.N.Y. 1974).

We believe the relevant teaching of *Ruffalo* is not a label for disciplinary proceedings but a recognition that the potentially serious consequences for the attorney invoke substantial procedural due process protections. There is nothing in the fourteenth amendment or interpretive case law which requires the thirty-day filing requirement to be construed as mandatory.

The same reasoning applies to a question we raise: timeliness of respondent's appeal. Iowa Sup. Ct. R. 118.10 and 118.11 give respondent twenty days after Commission's report is filed to file "a statement of exceptions to such report . . . and notice of appeal." Respondent's first appeal notice was not accompanied by a statement of exceptions. His second notice of appeal incorporated a statement of exceptions but was filed March 29, 1978, sixteen days late.

Iowa R. App. P. 5, which provides that appeals from district court "must be taken within, and not after, thirty days" of final judgment, has been construed as mandatory and jurisdictional. *See, e.g., Lundberg v. Lundberg,* 169 N.W.2d 815, 817 (Iowa 1969). The language of rule 118.11 is different.

In any event the Commission's decision is not a final adjudication of the case. Whether or not either party appeals, a recommendation of discipline is reported to this court where it stands "for final disposition." Rule 118.9. *See also* rule 118.10; *Committee on Professional Ethics and Conduct v. Crary,* 245 N.W.2d 298, 303 (Iowa 1976).

We find the relevant language of rules 118.9 and .10 to be directory only. We have jurisdiction to reach the merits in this disciplinary proceeding.

By so holding we do not condone delays in processing disciplinary proceedings. The attorney and the public both deserve speedy disposition of such changes.

IV. *Is the wording of old EC 5-5 so vague and indefinite as to deprive respondent of due process?*

Although respondent's brief articulates the issue substantially in this form, his arguments, both oral and written, display a basic ambivalence.

He asserts he was deprived of due process because counts I and II of the complaint were vague. We cannot agree. They respectively contained thirteen and eleven, extensive paragraphs of factual recital detailing respondent's alleged activities. Each count specified the ethical considerations and disciplinary rules he allegedy violated. The complaint was more detailed than would have been required even for a criminal information or indictment.

Due process in a criminal case requires only that the accused be informed of the nature and cause of the accusation. *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562, 572 (1975). This complaint in a disciplinary proceeding clearly passes constitutional muster. We also note that the Commission could order any such defect corrected if given the opportunity. Respondent should have made this argument before the Commission.

Respondent also asserts old EC 5-5 was so vague it violated his due process rights under the fourteenth amendment to the United States Constitution, and article I, section 9 of the Iowa constitution. Again, we cannot agree.

In this contention respondent assumes a heavy burden in overcoming the presumption of constitutionality and in negating every reasonable interpretation upon which the rule might be sustained. *Millsap v. Cedar Rapids Civil Service Commission,* 249 N.W.2d 678, 684 (Iowa 1977); *see Board of Supervisors v. Department of Revenue,* 263 N.W.2d 227, 235 (Iowa 1977); *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d 17, 25 (Iowa 1977).

The purpose of the canons, as explained by the ethical considerations, disciplinary rules, and adjudicated decisions, is to show lawyers the professionally acceptable route through the questions or doubts which may arise in their professional activities. *See Frerichs,* 238 N.W.2d at 769. But it is obvious the canons cannot contain enough "thou shalt nots" to identify every ethical temptation a lawyer will encounter in his or her practice. *See Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed 367, 371 (1952) ("Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."). Members of the bar can be assumed to know that certain kinds of conduct generally condemned by responsible persons, will be grounds for disciplinary action. *See Ruffalo,* 390 U.S. at 554-55, 88 S.Ct. at 1228, 20 L.Ed.2d at 124-25 (White, J., concurring). It is significant, we think, that respondent has cited no decision in which any part of the canons has ever been found to be unconstitutionally vague or indefinite.

Courts have generally recognized that in certain contexts where the target of regulation is confined and the need for leeway in regulation is great, vagueness is

difficult to prove. *See, e.g., Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (military justice code); *Boyce,* 342 U.S. at 337, 72 S.Ct. at 329, 96 L.Ed. at 367 (ICC regulation); *Millsap,* 249 N.W.2d at 684-86 (civil service statute authorizing discharge for "misconduct").

The Iowa Code of Professional Responsibility for Lawyers regulates lawyers' conduct only. The need for flexibility in governing their conduct is well established. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572, 588 (1975).

Old EC 5-5 was not unconstitutionally vague. It plainly provided a lawyer should not draft instruments naming him or her beneficially except in exceptional circumstances. It is no exceptional circumstance when the client desires the attorney to be so named: Under the language of the relevant provision that is assumed. What might constitute an exceptional circumstance need not be enumerated in the canon.

We find the constitutional issues raised by respondent to be without merit.

V. *Is the drafting of a will in which the drafting attorney is named as a contingent beneficiary unethical conduct or a violation of EC 5-5?*

Respondent on this issue ignores EC 5-5 and asserts, "The general view prior to the adoption of the

present DR 5-101(B) was that although it was not a preferable practice the drawing of a will for a client in which the attorney is named as a beneficiary was not prohibited." The cases do not support this statement. *In re Krotenberg,* 111 Ariz. 251, 527 P.2d 510 (1974); *Columbus Bar Association v. Ramey,* 32 Ohio St. 2d 91, 98, 290 N.E.2d 831, 835 (1972); *In re Gonyo,* 73 Wis.2d 624, 245 N.W.2d 893 (1976). *See generally* Annot. 98 A.L.R.2d 1234 (1964).

The language in the opinions relied on by respondent is antiquated. None of the authorities respondent cites were involved with a rule like EC 5-5. The bench and bar are increasingly sensitive to the appearance of impropriety inherent in these situations. Ethical consideration 5-5 as it appeared at the time of these events was fashioned to steer lawyers away from such danger areas.

A violation of EC 5-5 — part and parcel of our ethical code — would be unethical conduct. Defendant does not dispute he was beneficially named in the will, even though he was a contingent beneficiary.

VI. *Did complainant prove a violation of EC 5-5 by a convincing preponderance of the evidence?*

With the above legal standard in mind we examine the facts. Respondent admits he drafted wills for Eilert and Nellie Wumkes in which he was beneficially named. Thus we must necessarily determine whether there were "exceptional circumstances" which permitted such conduct. Complainant carries the burden of showing the violation "by a convincing preponderance of the evidence." *Kraschel,* 260 Iowa at 194, 148 N.W.2d at

625. At the outset we note, contrary to respondent's contentions, that it is not necessary for the purposes of this proceeding for complainant to show fraud, deceit, undue influence or overreaching.

Respondent, age fifty-four, was admitted to the bar in 1954. He did not practice law until 1962 when he took over his deceased father's practice. He soon met Eilert and Nellie Wumkes, brother and sister, unmarried, aged, and very wealthy. They had been his father's clients and friends.

In 1963 respondent drafted wills for Eilert and Nellie in which each left all property to the other and, at their request according to respondent, named him executor.

There is physical and testimonial evidence respondent later prepared a codicil for Nellie which made him and his two minor daughters contingent beneficiaries. There is uncontradicted evidence Eilert and Nellie liked respondent and the daughters. There is also evidence Nellie was distressed by the bequest to respondent in this unexecuted codicil.

In 1969, respondent received $7500 from Eilert and Nellie, represented by unsecured promissory notes which he prepared. These carried no due date and only five percent interest. Respondent testified these funds were used to relocate his office and were intended initially to be a gift. He says the notes were drafted at his suggestion but he admits he did not advise them to consult other counsel prior to this transaction.

April 7, 1972, Eilert and Nellie executed wills prepared by Waterloo attorney W. Louis Beecher. Beecher was the family lawyer for Kenneth Dalziel, whose son James had worked on Nellie's farms. Kenneth testified Nellie wanted a different lawyer because she was dissatisfied with respondent's services. Beecher's secretary testified Nellie said she didn't trust respondent and "didn't want him handling their affairs at all." Nellie also asked Beecher to assist in collecting respondent's promissory notes.

In these April wills each testator gave the other a life estate with the remainder to various charities and persons, including Kenneth and his son. Kenneth was co-executor. Neither respondent nor Beecher was mentioned in the will.

November, 1972, Eilert and Nellie executed two more wills prepared by Beecher. Under these wills Kenneth's bequest was eliminated but he remained as co-executor, now with his son. In the same month Beecher sent respondent a collection letter on the notes. Respondent made no response.

June, 1973, Eilert and Nellie executed wills prepared by Parkersburg attorney Culver E. Klinkenborg. The change in attorneys appears to have been motivated by the distance to Waterloo, and, according to Klinkenborg, the sophisticated estate planning urged by Beecher. Klinkenborg testified the testators believed respondent had drafted wills in which, contrary to their wishes, he was a beneficiary.

These June wills did not contain the reciprocal bequests. Each testator left his or her property to

numerous friends and charities. Klinkenborg testified this change was effected to keep part of the property from being taxed in two estates. Klinkenborg was named as co-executor. Respondent's name was not mentioned in either will. Klinkenborg drafted first codicils to these wills which were executed in September, 1973.

The latter also wrote respondent three times at Wumkeses' request, demanding payment of the notes. Although the first letter stated, "Nellie and Eilert want all future contacts of whatever nature to be made through me . . . ," respondent ultimately paid the Wumkeses directly.

Respondent testified he still performed legal services for Eilert and Nellie throughout this period and considered himself their lawyer, despite the other wills and loss of their tax work. Their tax returns for 1972 were prepared by Beecher in 1973. Klinkenborg prepared subsequent tax returns.

November 15, 1974, Eilert and Nellie executed wills prepared by respondent at Nellie's request. These wills merely left everything to the survivor. Respondent was not mentioned.

January 31, 1975, Eilert and Nellie executed two more wills drafted by respondent. There is credibile evidence in the record that he visited them at their request, prepared the wills, delivered rough drafts, and returned in several days to supervise execution of the documents. These wills bequeathed testator's property to the survivor with contingent bequests to various persons, including respondent, who was bequeathed real estate worth approximately $320,000.

Soon after execution of these wills Wumkeses sought to have them revoked. Nellie showed Kenneth Dalziel the wills and said, "That isn't what we want in our wills." The latter took them to Klinkenborg, who prepared second codicils reaffirming the June, 1973, wills and revoking all others. These codicils were executed February 14, 1975, just two weeks after the execution of the wills drafted by respondent. In early March, 1975, Klinkenborg prepared and Eilert and Nellie executed new wills which were similar in testamentary design to the June, 1973, wills.

In April, 1975, Eilert apparently suffered a stroke and was hospitalized. On June 1 he was transferred to a nursing home. He was eighty-seven years old and in poor health, both mentally and physically.

On June 11, 1975, respondent obtained Eilert's signature on a will identical to the one prepared in January. According to respondent, Nellie could not remember whether any intervening wills had been executed since January and asked him to prepare another for Eilert to sign. Respondent took Nellie to the nursing home, left the will with Eilert and returned some time later. When nursing home employees refused to witness the will, respondent served as one of the witnesses. He testified he knew this would forfeit his contingent bequest. *See* §633.281, The Code. The record also discloses it was apparent Nellie probably was going to survive Eilert and would be beneficiary of all his property under the will respondent drafted.

Although respondent testified Eilert was awake, alert and aware of what he was signing, the overwhelming weight of evidence is to the contrary.

After this incident Eilert and Ne e, with Klinkenborg's assistance, filed voluntary petitions for appointment of Kenneth as conservator.

Eilert died October 16, 1975. With Klinkenborg's assistance Nellie offered the March, 1975, will for probate. Respondent petitioned to set aside the probate of this will. Nellie was named as joining that petition.

Nellie, age eighty-five, was placed in a nursing home in October, 1975. In February, 1976, respondent visited her and obtained her signature on a petition to terminate her conservatorship. This petition was denied in May, 1976.

From the above it is obvious respondent, among other things, repeatedly prepared wills which named him beneficially. But he suggests "exceptional circumstances" — a paucity of heirs and the close relationship between clients and attorney — renders EC 5-5 inapplicable.

While the Wumkeses may not have wanted to leave property to their nephews and nieces, there were many potential beneficiaries. The Commission found, "[T]he record is filled with attorneys and would-be beneficiaries making a trail to the Wumkeses household bestowing gifts and flattery . . ." Eilert and Nellie frequently evidenced a desire to make charitable bequests as well. There was no basis for reasoning the property was in danger of passing to strangers.

There is also no reason to question that from time to time Eilert and Nellie wanted to leave respondent property.

We cannot find anything exceptional in the above circumstances. Lawyers involved in probate and estate planning often observe the syndrome evidenced here: the frustration and vacillation of wealthy and childless, old persons without close family ties. The resulting vulnerability only enhances the EC 5-5 requirement. Another lawyer selected by the client should draft the instrument which beneficially names the client's lawyer. We find respondent violated EC 5-5.

We have examined the record in light of the other unrelated charges contained in the complaint, because in our de novo review we are permitted to reach a different result from the Commission even though complainant did not appeal. *See Crary,* 245 N.W.2d at 303. While at least two other charges present close questions, we find the alleged ethical violations are not supported by the required quantum of proof.

We hold that respondent's license to practice law shall be suspended indefinitely and shall not be reinstated for a period of three years from date of this decision.

Respondent's suspension shall apply to and include all facets of the ordinary law practice, including but not limited to those specific services itemized in Iowa Sup. Ct. R. 118.12. He shall take prompt steps to comply with new Iowa Sup. Ct. R. 118.18, adopted by order of this court dated January 15, 1979, relating to notification of clients and counsel.

LICENSE SUSPENDED.

(FILED APR 19 1979)

IN THE SUPREME COURT OF IOWA
No. 2-61443

ORDER

THE COMMITTEE ON PROFESSIONAL
ETHICS AND CONDUCT OF THE
IOWA STATE BAR ASSOCIATION,
Complainant-Appellee,

vs.

JOHN E. BEHNKE,
Respondent-Appellant.

After consideration by the court en banc, respondent-appellant's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 19th day of April, 1979.

Chief Justice — Iowa Supreme Court

Copies to:

George Lindeman, Esquire
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Roger J. Kuhle, Esquire
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IN THE SUPREME COURT OF THE
STATE OF IOWA

NO. 61443

THE COMMITTEE ON PROFESSIONAL
ETHICS AND CONDUCT OF THE
IOWA STATE BAR ASSOCIATION,
Appellee,

vs.

JOHN E. BEHNKE,
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN E. BEHNKE, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Iowa entered March 21, 1979, which became final on April 19, 1979 when the Supreme Court of Iowa denied appellant's petition for rehearing to said final judgment.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

KELLY, BLACK, BLACK,
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Telephone: (305) 358-5700

By: /s/ Hugo L. Black, Jr.
Hugo L. Black, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to ROGER J. KUHLE, ESQ., 600 Hubbell Building, Des Moines, Iowa 50309, this 11th day of July, 1979.

/s/ Hugo L. Black, Jr.
Hugo L. Black, Jr.

in the

Supreme Court

of the

United States

October Term, 1979

No. 79-130

JOHN E. BEHNKE,

Appellant,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLEE

August 10, 1979

INDEX

CITATIONS

in the

Supreme Court

of the

United States

October Term, 1979

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JOHN E. BEHNKE,

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v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF IOWA

MOTION TO DISMISS OR AFFIRM

The Appellee, The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, respectfully moves the Court to dismiss the appeal in the above-captioned case, or in the alternative, to affirm judgment of the Supreme Court of Iowa on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Iowa is reported below as *The Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke*, 276 N.W.2d 838 (Ia. 1979).

JURISDICTION

The Supreme Court of Iowa entered judgment on March 21, 1979, suspending the Appellant from the practice of law in the State of Iowa for a period of three years. The Supreme Court of Iowa denied Appellant's petition for rehearing of the case on April 19, 1979. Notice of Appeal to this Court was timely filed in the Supreme Court of Iowa on July 11, 1979. Appellant asserts in his jurisdictional statement that the Court has jurisdiction by reason of Title 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellant claims in his jurisdictional statement that his suspension from the practice of law was in violation of his due process rights under the Fourteenth Amendment of the Constitution. Appellant was suspended for naming himself beneficially in a will he drafted for a client. This has always been proscribed. This long standing proscription was at all times here material part of the

Iowa Code of Professional Responsibility for Lawyers, Ethical Considerations 5-5 and 5-6, 40 *Iowa Code Ann.* 497 (1975) (now transferred to DR5-101(B)), which states as follows:

> "EC 5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."
>
> "EC 5-6. A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

QUESTION PRESENTED

Whether a reasonably informed Iowa lawyer possessing a modicum of ethical values could fail to be apprised that drafting a will for a client which names the lawyer beneficially is unethical.

STATEMENT OF THE CASE

The Supreme Court of Iowa entered judgment on March 21, 1979, suspending the Appellant from the practice of law in the State of Iowa for a period of three years.

The Appellee, The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, is charged under Iowa Supreme Court Rule 118 with the responsibility to prosecute complaints against any attorney licensed to practice law in Iowa for ethical violations. The Grievance Commission of the Supreme Court of Iowa holds a hearing to collect the evidence and thereafter makes findings of fact and either dismisses the complaint or recommends that the Iowa Supreme Court take disciplinary action.

The Respondent was charged with naming himself beneficially and as the executor in a will he drafted for a client. These prohibitions were then contained in Ethical Considerations 5-5 and 5-6 of the *Iowa Code of Professional Resonsibility for Lawyers.* The Grievance Commission found that these charges were proven by a clear and convincing preponderance of the evidence. The Supreme Court of Iowa upon a de novo review of the

evidence sustained the findings of fact as supported by a clear and convincing preponderance of the evidence. (J.S. pp. 13a-19a). Appellant does not challenge the findings of fact of the Grievance Commission or the Supreme Court of Iowa as unsupported by the evidence. Appellant raises on this appeal a single question of due process under the Fourteenth Amendment to the Constitution.

The relevant facts (all known to the Appellant) upon which the Grievance Commission and Supreme Court of Iowa found Appellant was guilty of unethical conduct are as follows:

1. Eilert and Nellie Wumkes were clients of the Appellant. He drafted wills for them in 1963 in which he was named executor but not a beneficiary.

2. In April of 1972 another attorney was contacted by the Wumkeses to draft a second set of wills. Appellant was not named either as an executor or beneficiary. Nellie Wumkes stated to this attorney that she was dissatisfied with Appellant as an attorney and "didn't trust him."

3. In June of 1973, a third set of wills was drafted by yet another attorney. Appellant was not a beneficiary under these wills.

4. In November of 1974, Appellant prepared a will for Nellie Wumkes. He was not a beneficiary.

5. On January 31, 1975, Eilert and Nellie Wumkes (now quite elderly) executed wills prepared by the Appellant wherein he was named a contingent beneficiary of 160 acres of Iowa farmland worth $320,000.

6. The Wumkeses repudiated these wills on February 14, 1975. Nellie showed an attorney (not Appellant) the devise to Appellant and said "that isn't what we want in our wills." This attorney then prepared codicils reaffirming the provisions of the June, 1973 wills. Also, in early March of 1975 new wills were executed reaffirming the provisions of the June 1973 wills in which Appellant was not a beneficiary.

7. On March 15, 1975, Nellie sustained a head injury which her doctor stated left her in a "confused condition."

8. On April 29, 1975, Eilert was admitted to a hospital with a stroke. He was eighty seven years old and in poor mental and physical health. On June 1, 1975, he was transferred to a nursing home where he remained for the rest of his life.

9. On June 11, 1975, Appellant, at the nursing home, obtained Eilert's signature on a will identical to the one prepared in January by Appellant in which he was the last contingent devisee to the 160 acre Iowa farm.

10. Shortly thereafter, Eilert and Nellie Wumkes filed voluntary petitions for appointment of conservatorships which were prepared by an attorney other than Appellant.

11. Eilert died in October, 1975 and Nellie offered the March, 1975 will for probate. Appellant petitioned to set aside the probate of this will and to probate the one naming him beneficially.

12. In February, 1976, Appellant obtained the signature of Nellie Wumkes, who at the time was confined to a nursing home, on a petition to terminate the conservatorships. The petition was denied in May 1976.

The Supreme Court of Iowa found the Appellant's conduct under these circumstances to be unethical:

> "We cannot find anything exceptional in the above circumstances. Lawyers involved in probate and estate planning often observe the syndrome evidenced here: the frustration and vacillation of wealthy and childless old persons without close family ties. The resulting vulnerability enhances the EC 5-5 requirement. Another lawyer selected by the client should draft the instrument which beneficially names the client's lawyer." *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke,* 276 N.W.2d 838, 846 (Ia. 1979).

ARGUMENT

I.

The State of Iowa has a compelling interest in maintaining the integrity of its bar to promote public respect for the processes of judicial administration. Iowa, in furtherance of this interest, may constitutionally require an attorney to demonstrate "good moral character" as a condition to his continued practice of law in Iowa. The essence of good moral character is being able to tell right from wrong. The attorney-client relationship is a fiduciary one requiring the highest standard of trust and confidence. The attorney must exercise his independent judgment only for the benefit of the client. He cannot do this if he has a pecuniary (self) interest or can personally benefit from the advice given.

The *Code* is read and applied as a whole; not in a piecemeal fashion as contended by the Appellant. The *Code* articulates the standards of conduct for lawyers that the Courts have always recognized and applied. From Canon 1 through Canon 9, the *Code* is simply a restatement of the high standards to which lawyers have always been held. The Canons emphasize and establish that the cornerstone of the attorney-client relationship is the lawyer's honesty, integrity, and truthfulness; i.e. good moral character.

For example, the very first Ethical Consideration provides:

> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards it the ethical responsibility of every lawyer."

EC 9-1 provides:

> "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our legal system and in the legal profession."

The Appellant utterly failed to even begin to discharge his professional responsibility to the Wumkeses. Part and parcel of the Appellant's fiduciary duty to the Wumkeses was that he "should insist" that their will, if it was to name him beneficially, be prepared by another who was "cognizant of the circumstances" and could give "disinterested advice." Iowa has a definite interest in insuring that a lawyer's fiduciary duty to his clients is discharged. This is the sense of the Iowa Supreme Court's action herein (A. p. 11a-13a) and in *In Re Frerichs*, 238

N.W.2d 764 (Ia. 1976) (duty to the court and the system of justice). It is not a witch hunt to require that lawyers discharge their professional responsibility.

This Court has long recognized that States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). The interest of the States in regulating lawyers is especially great since lawyers are essential to the administration of justice. *Cohen v. Hurley,* 366 U.S. 117 123-124, 81 S.Ct. 954, 958 6 L.Ed.2d d156 (1961). The Supreme Court of Iowa has the inherent power to discipline those lawyers whose conduct is found to be unprofessional. *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). One precondition that may be constitutionally imposed upon a member of the bar is that he demonstrate "good moral character." *Konigsberg v. State Bar of California,*

353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); *Schware v. Board of Examiners of New Mexico,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Iowa has long required that lawyers must demonstrate good moral character as a requisite for continuing the practice of law. *State v. Rohrig,* 159 Iowa 725, 139 N.W. 908, 912 (1913).

John Behnke, the Appellant, believes that he could no more be "convicted" of violating an ethical consideration than he could of violating a Biblical Commandment. With all due respect, the *Code of Professional Responsibility* does not state anywhere, "Thou Shalt Not Abuse A Client's Confidence." Yet, adherance to this command has always been required of lawyers and now is explicit throughout the *Code of Professional Responsibility for Lawyers.*

John Behnke would have the Court read into the *Code of Professional Responsibility* all of the requirements of precision of expression demanded of criminal statutes. Such an interpretation defeats the spirit and purpose of the *Code* by imposing a rigid classification of "crimes".

The practice of law is a profession requiring advanced education and training. Part and parcel of this advanced education and training encompasses knowledge of the lawyer's professional responsibility. A lawyer must know and appreciate the ethics of the profession without

being told their application to each specific factual situation in explicit language. The present *Code of Professional Responsibility* was drafted by lawyers, after a lengthy study, to provide a single document articulating most, but not all, of these existing ethical standards. While it is true that a layman should be informed in language that is as precise as possible what conduct will subject him to criminal sanctions, the same is not true for members of a professional or a particular trade (assuming arguendo that disciplinary sanctions can be equated to criminal ones). This requirement is less strict because of the affluence, knowledge, and education of these parties. *Boyce Motor Lines, Inc. v. U.S.*, 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367, 371 (1952) and *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

Lawyers know they are held to high standards. The *Code of Professional Responsibility* is read as a whole and applied to a given situation. When a reasonable attorney, knowing of these high standards, would know that his conduct was unethical, there is no problem of vagueness. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 444 (1978) and *Ohralik v. Ohio State Bar*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 444 (1978).

Bouie v. Columbia, 378 U.S. 347, is plainly inapposite to the case at bar because that case involved the due process right to notice that a criminal defendant's conduct would be in violation of the law. *Bouie* does not involve the standards and duties imposed upon lawyers by the *Code of Professional Responsibility*.

II.

A reasonable attorney would know that John Behnke's conduct in drafting a will in which he was named beneficially would subject him to disciplinary action.

In the case of *In Re Ruffalo* 390 U.S. 544, 555, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968), Mr. Justice White in his concurrence made a statement that is appropos to this case:

> "A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be demed to have been on notice that the courts would condem the conduct for which he was removed ...
>
> **********
>
> Even when a disbarment standard is as inspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se*. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession."

Ethical Consideration 5-5 is not unspecific as was the standard in question in *Ruffalo*. Ethical Consideration 5-5 is certain and specific: "an attorney shall not draft a will in which he is beneficially named."

The conduct now articulated as proscribed by EC 5-5 is a restatement of old Canon 9, *Canons of the American Bar Association. Cross Index to the Code of Professional Responsibility, American Bar Association.* The footnotes from EC 5-5 and EC 5-6 also establish that this conduct has long been proscribed. The case of *In Re Jones,* 254 Ore. 617, 462 P.2d 680 (1969) flatly states that this is conduct which an attorney need not be told is blantantly wrong. States which had ruled on the question prior to the time Appellant named himself beneficially, unanimously condemned the practice. *In Re Moore,* 218 Ore. 403, 345 P.2d 411 (1959); *In Re Kneeland,* 233 Ore. 241, 377 P.2d 861 (1963); *Columbus Bar v. Ramey,* 32 Ohio St.2d 91, 61 Ohio App. 338, 290 N.E. 2d 831 (1972); *In Re Krotenburg,* 111 Ariz. 251, 527 P.2d 510 (1974); *Lantz v. State Bar of California,* 212 Cal. 213, 298 P. 497 (1931); *In Re MacFarlane,* 10 Utah2d 217, 350 P.2d 631; *In Re Vilkomerson,* 270 App. Div. 166, 58 N.Y.S.2d 922 (1945); *In Re Anderson,* 287 N.E. 2d. 682 (Ill. 1972); see also the numerous cases cited at 98 A.L.R.2d 1234. These authorities establish:

1. A reasonably informed attorney would be on notice that his conduct in drafting a will in which he is named beneficially will subject him to disciplinary sanctions.

This has long been the rule established by cases decided well before Behnke's conduct in 1975, so that Appellant's claim of lack of "notice" is without merit.

2. The prohibition contained in EC 5-5 is based on the long and unhappy experience of the bar in attempting to regulate situations fraught with potential for overreaching and abusing clients. EC 5-5 is merely the current articulation of a long standing prohibition.

This Court has stated that states may take broad measures to correct the substantive evils of undue influence, overreaching, misrepresentation, and conflict of interests. *In Re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 444 (1978). Ethical Consideration 5-5 is a very explicit attempt to regulate a recurring situation in the professional lives of attorneys. The flat prohibition in EC 5-5 that an attorney shall not draft a will in which he is named beneficially serves a legitimate regulatory purpose. The potential for overreaching inherent when an attorney undertakes to draft a will for a client in which the attorney is to be named beneficially is real. States may take reasonable steps to correct this evil. This is all that Iowa has done in this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Appeal, or in the alternative, affirm the judgment of the Supreme Court of Iowa.

Respectfully submitted,

/s/ Lee H. Gaudineer
Lee H. Gaudineer

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/s/ Hedo M. Zacherle
Hedo M. Zacherle

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ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to HUGO L. BLACK, JR. ESQ., Kelly, Black, Black, Wright & Earle, P.A., 1400 Alfred I. duPont Building, Miami, Florida 33131, this 10th day of August, 1979.

/s/ Lee H. Gaudineer
Lee H. Gaudineer

in the

Supreme Court

of the

United States

October Term, 1979

NO. 79-130

JOHN E. BEHNKE,

Appellant,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

On Appeal from the Supreme Court of Iowa

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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August 23, 1979

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

Appellant cannot and does not answer the "Question Presented."

Instead, appellant begs it. Regardless of how unethical it may be to draft a will for a client which names the lawyer beneficially, the Iowa Code Of Professional Responsibility For Lawyers admittedly did not warn that such conduct could result in discipline. Indeed, that code affirmatively indicated otherwise — that "The Ethical Considerations are aspirational in character . . . The Disciplinary Rules, unlike the Ethical Considerations are mandatory in character."

If this Court allows the Iowa Bar to flout due process by suspending a lawyer from practice for three years for conduct the Iowa Bar described as merely "aspirational in character," then it will not be long before the Iowa Bar begins to require this or that maverick Iowa attorney to demonstrate "good moral character" as "a condition to his continued practice of law in Iowa." Witness the insensitivity of the Iowa Bar to due process considerations on page 9 of its brief. There the Iowa Bar incredibly claims the right to single out particular attorneys and require them to demonstrate "good moral character" as a condition to the continued practice of law in Iowa.

The authorities in Salem, Massachusetts, similarly claimed the right to single out particular old hags and required them to demonstrate that they were not witches as a condition of continued life.

Respectfully submitted,

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By: /s/ Hugo L. Black, Jr.
Hugo L. Black, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to LEE H. GAUDINEER, ESQ., 600 Hubbell Building, Des Moines, Iowa 50309, HEDO M. ZACHERLE, ESQ., 1101 Fleming Building, Des Moines, Iowa 50309 and JOHN WERNER, ESQ., Office of Attorney General, State Capitol Building, Des Moines, Iowa 50310, this 23rd day of August, 1979.

/s/ Hugo L. Black, Jr.
Hugo L. Black, Jr.